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IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1986

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

NO.

IRWIN A. SCHIFF,

Petitioner.

- VS -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals violated prior rulings of this Court and set itself in conflict with other Federal Circuits by applying an "objective reasonableness" test to the good faith defense in an attempted tax evasion prosecution.

2. Whether the Second Circuit Court of Appeals violated the holding of this Court in Spies v. United States, 317 U.S. 492 (1943), by permitting the jury to convict Petitioner of attempted income tax evasion without first finding some willful commission in addition to the willful omission of failing to file a return or pay a tax.

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The Petitioner, IRWIN A. SCHIFF,
respectfully prays that a writ of
certiorari be issued to review the judg-
ment and opinion of the United States Court
of Appeals for the Second Circuit entered
in this proceeding on September 15, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 801 F.2d 108 (2d Cir. 1986), and appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on September 15, 1986. A timely petition for rehearing was denied on October 22, 1986. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals violated prior rulings of this Court and set itself in conflict with other Federal Circuits by applying an "objective reasonableness" test to the good faith defense in an attempted tax evasion prosecution.

2. Whether the Second Circuit Court of Appeals violated the holding of this Court in Spies v. United States, 317 U.S. 492 (1943), by permitting the jury to convict Petitioner of attempted income tax evasion without first finding some willful commission in addition to the willful omission of failing to file a return or pay a tax.

STATUTES INVOLVED

26 U.S.C. §7201 provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony...."

26 U.S.C. §7203 provides in pertinent part: "Any person required under this Title to pay any...tax, or required by this Title or by regulations made under authority thereof to make a return..., who willfully fails to pay such...tax, make such return, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor...."

STATEMENT OF THE CASE

Irwin A. Schiff, the Petitioner here, was convicted at a jury trial of three counts of attempted income tax evasion in violation of 26 U.S.C. §7201 for having "willfully and knowingly attempt[ed] to evade and defeat the...income tax due and owing by him to the United States...by failing to make such income tax return to the said Internal Revenue Service, and by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income" for the calendar years 1980, 1981 and 1982. He also was convicted of one count of failure to file a corporate return for Irwin A. Schiff, Inc., for the fiscal year ended August 31, 1981, in violation of 26 U.S.C. §7203. (App. pp. 2b-3b, 1c-6c)

It was not disputed at the trial that Mr. Schiff had filed no personal income tax returns for the years in question, that he was the President of Irwin A. Schiff, Inc.,

and that the corporation also had not filed a return for the year involved. Mr. Schiff, however, was and to some extent remains a leading author and lecturer who advocates the view that citizens are not legally obliged to file tax returns or pay the federal income tax. The trial centered upon Mr. Schiff's state of mind and the nature of his intentions.

The evidence at trial demonstrated clearly the utter absence of any effort to conceal income or the failure to file and pay taxes. Indeed, Mr. Schiff was shown consistently to have broadcast his views to the world, including advertisements in leading newspapers announcing his intention not to file or pay taxes. At the same time, evidence showed that he habitually deposited cash receipts in his personal bank account, thus creating records of cash receipts where none otherwise would have existed.

The Government's evidence, consisting of tape recordings, videotapes, books and articles, newspaper advertisements and

testimony from witnesses, all demonstrated that Mr. Schiff consistently had announced to the world in general and to the IRS in particular his belief, based upon an asserted reading of the United States Constitution and the Internal Revenue Code, that "the income tax is voluntary" and that "there is no provision in the law requiring anyone to file a tax return." Several prosecution witnesses admitted under cross-examination that Mr. Schiff sincerely and passionately believed that he had no legal obligation to file returns or pay taxes and that he is a man of great honesty and integrity who in refusing to file returns or pay taxes was acting upon genuine convictions concerning the meaning of the law. Mr. Schiff also presented testimony from attorneys and other witnesses that they had advised Mr. Schiff that he had no legal obligation either to file or to pay.

The jury deliberated over a period of three days. Every substantive question during deliberation sought clarification of the law relating to the necessary mental

state for guilt. On the third day, the jury reported itself deadlocked on the first three counts. The Court instructed the jury in accordance with Allen v. United States, 164 U.S. 492 (1896), but the jury remained undecided.

The Court at that point instructed the jury that the "willful attempt in some manner to evade or defeat the tax" necessary for conviction on the first three counts could be found upon the basis of facts alleged in the Indictment or in "some other manner...that in some way that the defendant took some action, the purpose of which...was to evade or defeat or attempt to evade or defeat...the tax." (App. pp. 130e-135e) The defendant excepted to the charge on the ground that it permitted him to be convicted for actions not pleaded and without unanimity, and when Mr. Schiff was convicted 30 minutes later, he pursued these issues on appeal.

On appeal, the Second Circuit rejected Mr. Schiff's argument that the Court's reinstruction permitted a non-unanimous

jury verdict based upon facts not pleaded. In doing so, the Court held that there was no error in this respect. Rather, the Court held that Mr. Schiff had misunderstood the jury charge. The jury in fact was instructed, in the view of the Second Circuit, in a manner which was essentially circular. The trial Court had charged the jury that in order to convict it must find that Mr. Schiff "willfully attempted, in some manner, to evade or defeat such tax, with the specific intent to defraud the Government of such tax." The Court of Appeals held that the phrase "in some manner" simply referred back "to one or more of the three alleged methods of evasion." (App. p.21b) The "three methods" were those alleged in the Indictment -- (1) failure to file, (2) failure to pay, and (3) "concealing and attempting to conceal...his true and correct taxable income." Thus, the jury was permitted to convict Mr. Schiff solely upon a finding of failure to pay or failure to file.

The defense at trial was that Mr.

Schiff had no fraudulent intent but, rather, failed to file and failed to pay upon the basis of a sincere if misguided belief that he was not obliged to do so. The Court instructed the jury repeatedly on this issue as follows: "In considering the defendant's claim that in good faith he did not believe the law required him to file returns or to pay taxes on income, the question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determination of these questions must be made after examining all of the evidence." (App. p. 30e) The Petitioner excepted to this as a "should have known" charge which violated this Court's holdings in United States v. Bishop, 412 U.S. 346, 360 (1973), and United States v. Pomponio, 429 U.S. 10, 12 (1976). (App. pp. 54e-56e)

On appeal, the Second Circuit questioned whether the charge as given really did impose an objective reasonableness test upon Petitioner's assertion of good faith,

but went on to hold that if such a test were imposed, such an instruction was not erroneous. Thus, the Court of Appeals in this case has authorized the District Courts in the Circuit to impose an objective reasonableness test upon the good faith defense in income tax evasion prosecutions. The Court expressly declined to follow the First Circuit's contrary holding in United States v. Aitken, 755 F.2d 188, 193 (1st Cir. 1985), although questioning whether that decision really prohibited an instruction like the one given here. (App. pp. 8b-17b)

REASONS FOR GRANTING THE WRIT

- I. The Second Circuit Court of Appeals violated prior rulings of this Court and set itself in conflict with other Federal Circuits by applying an "objective reasonableness" test to the good faith defense in an attempted tax evasion prosecution.

In United States v. Aitken, 755 F.2d 188 (1st Cir. 1985), the First Circuit held specifically that a good faith misunderstanding of the law, however farfetched, is

a valid defense to prosecution for either attempted income tax evasion or failure to file returns. Under that holding, the standard by which a jury must judge the good faith defense is a purely subjective one: did the defendant actually believe it? Qualifying the defense with any sort of test of objective reasonableness is plain error. See also, United States v. Dack, 747 F.2d 1172, 1175 (7th Cir. 1984); United States v. Phillips, 775 F.2d 262 (10th Cir. 1985).

The instruction approved by the Second Circuit in this case clearly is prohibited by the holding of the First Circuit as well as by the holdings of other Circuits noted. In this case, the trial Court twice instructed the jury to evaluate Petitioner's mistake of law defense by considering "whether there was a basis on which he could have held such a belief," and followed that instruction with another in which "deliberate indifference or refusal to be informed" was held out as a measure of good faith. See also, United

States v. Burton, 737 F.2d 439, 441-42 (5th Cir. 1984); Mann v. United States, 319 F.2d 404, 409 (5th Cir. 1963), cert. denied 375 U.S. 986 (1964).

The Second Circuit in its decision argued that the trial Court's instruction in this case could be interpreted as simply an instruction that the jury should consider the presence or absence of a basis for the asserted belief as circumstantial evidence of whether the Petitioner really held the belief. That argument, however, is contradicted by the very language of the jury instruction objected to: "The question is, whether or not he truly held such a belief; and whether there was a basis on which he could have held such a belief. Your determination of these questions must be made after examining all of the evidence." (Emphasis supplied.) Thus, unquestionably, the trial Court imposed and the Court of Appeals approved two separate tests which a good faith defense must pass before it can be accepted by a jury -- (1) whether the defendant

"truly held such a belief," and (2) "whether there was a basis on which he could have held such a belief."

So far as can be determined, the Second Circuit is the only Circuit which has approved an objective reasonableness test for the good faith defense in an attempted tax evasion prosecution. This ruling is directly contrary to the holding of the First Circuit and appears to be contrary to the holdings of several other Circuits as well. Certiorari should be granted to resolve the clear conflict among the Circuits on this important issue of law.

II. The Second Circuit Court of Appeals violated the holding of this Court in Spies v. United States, 317 U.S. 492 (1943), by permitting the jury to convict the defendant of attempted income tax evasion without first finding some willful commission in addition to the willful omissions of failing to file a return and pay a tax.

As noted previously, the jury in this case deadlocked after three days of deliberation. By its questions, the jury

made it clear to the trial judge that the basis of deadlock was its inability to determine whether Petitioner had "concealed and attempted conceal" his income from the Government. The jury inquired whether the concealment and attempted concealment of income was an essential element of the offense charged in the first three counts of the Indictment. The Court responded that this element need not be found to have existed in order to convict, provided that the jury did find proven some other act or omission constituting a willful attempt to evade the tax.

On appeal, Petitioner contended that this re-instruction permitted the jury to convict him upon the basis of allegations not contained in the Indictment and created a very substantial likelihood of a jury verdict which was not unanimous as to the underlying factual determinations. Petitioner specifically pointed out to the Court of Appeals that no other interpretation of the re-instruction would be reasonable, since of course the element of

of concealment and attempted concealment was essential to conviction because a mere failure to file a return and failure to pay a tax alone is not sufficient to constitute the crime of attempted tax evasion. Spies v. United States, 317 U.S. 492 (1943); United States v. Copeland, 786 F.2d 768 (7th Cir. 1986).

The Court of Appeals, however, did not interpret the jury instruction in the same way Petitioner did. The Court of Appeals held that the real meaning of the re-instruction was that the jury could convict Petitioner of attempted tax evasion upon the basis of any "one or more of the three alleged methods of evasion." (App. p. 21b) The Court of Appeals thus held here that evidence of a mere failure to file and failure to pay could constitute a sufficient basis to convict of attempted tax evasion. Since there was no dispute at trial that Mr. Schiff had indeed intentionally failed to file and failed to pay, it is not surprising that the jury returned a verdict of guilty on all counts almost

immediately after the re-instruction was given.

The re-instruction was a direct violation of the holding of this Court in Spies v. United States, supra. It also is clearly contrary to holdings this year in the Seventh Circuit and the Fifth Circuit. United States v. Copeland, supra; United States v. Nelson, 791 F.2d 336, 337-38 (5th Cir. 1986). Cf., Sansone v. United States, 380 U.S. 343, 351 (1965).

Because the Court of Appeals in this case interpreted the income tax evasion statute in a manner directly contrary to prior holdings of this Court as well as of the other Circuits, certiorari must be granted to correct the error.

CONCLUSION

For these reasons, to prevent a substantial deviation from the prior holdings of this Court in an important area of federal law and to resolve conflicts among the Circuits which are of the greatest importance in criminal tax evasion prosecutions, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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December 18, 1986